United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

75-7127

United States Court of Appeals

FOR THE SECOND CIRCUIT

B P/S

JACKSON C. KING,

Plaintiff-Appellee,

—against—

DEUTSCHE DAMPS-GES,

Defendant and Third-Party Plaintiff-Appellee-Appellant,

—against—

INTERNATIONAL TERMINAL OPERATING CO., INC. and COURT C RPENTRY & MARINE CONTRACTING COMPANY,

Third Party Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION FOR RE-HEARING AND/OR RE-HEARING *IN BANC* OF THIRD PARTY DEFENDANT-APPELLANT, COURT CARPENTRY & MARINE CONTRACTING COMPANY

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Preliminary Statement

The result of a trial before Court and jury in the above matter was that the plaintiff was found entitled to recover damages for his personal injuries from the primary defendant because such injuries were found to have been caused by the unseaworthiness of that defendant's vessel. Plain-

tiff's damage recovery was reduced by 25% because he was found by the jury to have been contributorily negligent to that extent.

In determining the indemnity claim against the two third party defendants, the jury granted the primary defendant indemnity from third party defendant, I.T.O., which had created the unseaworthy condition, and exonerated the plaintiff's employer, COURT CARPENTRY, from the claim against it.

Not satisfied with having been awarded indemnity from I.T.O., the defendant shipowner moved for the entry of judgment n.o.v. as against COURT CARPENTRY as well. That motion was granted by the Trial Judge and COURT CARPENTRY appealed therefrom.

In its opinion of August 8, 1975, this Court affirmed the action of the Trial Judge on the basis that the 25% contributory negligence of the plaintiff had to be imputed to COURT CARPENTRY, plaintiff's employer, and that such imputed contributory negligence made it liable.

Such affirmance, however, does not indicate the proportionate amount of liability which each of the third party defendants has to indemnify the shipowner and, indeed, there is still left in this case as an open and unresolved issue the claim by COURT CARPENTRY against I.T.O. for contribution (P. 543 of the Appendix on Appeal).

Relief Sought on Re-Hearing

The judgment awarding indemnity should be amended so that only 25% of the same is against COURT CARPENTRY and the balance against I.T.O. Alternatively, the matter should be remanded to the District Court for consideration and determination of COURT CARPENTRY's claim for con-

tribution against I.T.O. to the end that COURT CARPENTRY may recover from I.T.O. any liability on its part in excess of 25% of the indemnity claim.

Discussion

There can no longer be any doubt but that the maritime law requires contribution between joint tortfeasors, see *Cooper Stevedoring Co. Inc.* v. *Fritz Kopke Inc.*, 94 S. Ct. 2174 (1974); and *Hurdich* v. *Eastmount Shipping Corp.*, 503 F. 2d 397 (2 Cir. 1974). The only instance where contribution is not permitted is where it is sought against a person immunized by statute from tort liability, *Cooper Stevedoring Co. Inc.* v. *Fritz Kopke Inc., supra;* and *In re Seaboard Shipping Corp.*, 449 F. 2d 132 (2 Cir. 1971), cert. den., 406 U.S. 949. In the instant case, the third party defendant, I.T.O., was not the employer of the plaintiff and it is therefore not immunized by any statute from tort liability.

The question of whether or not such contribution should be on an equally divided basis or in proportion to fault was not actually resolved by the Supreme Court in *Cooper Stevedoring Co. Inc.* v. *Fritz Kopke Inc., supra,* because as the Court indicated in Footnote 3 of its decision (p. 2176 of 94 S. Ct.) the District Court in that case found on the evidence that the fault was equally divided. However, that question was clearly answered recently by the Supreme Court in *U.S.* v. *Reliable Transfer Co., Inc.*, 95 S. Ct. 1708 (decided May 19, 1975). The rule of equally divided damages among joint tortfeasors was abrogated as being unjust and inequitable and it was quite clearly held that liability for damage is to be allocated among the parties proportionate to the comparative degree of their fault.

In the case at bar, this Court's opinion of August 8, 1975 held that there was substantial evidence supporting the verdict that the vessel was unseaworthy "because the beams had been improperly stowed by ITO." Thus, I.T.O. is liable herein because it improperly created the condition which caused plaintiff's accident.

COURT CARPENTRY, on the other hand, has been held liable herein only because the plaintiff's contributory negligence of 25% has been imputed to it. Clearly, in line with allocating damage in accordance with degree of fault, COURT CARPENTRY should not be liable for more than 25% of the shipowner's damages. The balance of such damages should be borne by I.T.O.

As the record in this case is quite clear and fixes the precise percentage of COURT CARPENTRY'S fault (the same expressly being the imputation of plaintiff's 25% contributory negligence) it is respectfully submitted that the most efficacious way of handling this matter would be for this Court to enter a mandate amending the judgment herein so that the primary defendant recovers indemnity for 25% of its damages from COURT CARPENTRY and the balance from I.T.O.

If for some reason that procedure is not to be followed, then it is to be noted that there still remains an open and unresolved claim in this case relating to the claim made by COURT CARPENTRY in its answer (p. 543 of the Appendix on Appeal) for contribution from I.T.O. If the judgment is not amended by this Court, as above requested, then it is respectfully submitted this matter should be remanded to the District Court for consideration and determination of COURT CARPENTRY'S claim for contribution against I.T.O. to the end that COURT CARPENTRY may recover from I.T.O. any liability on its part in excess of 25% of the indemnity claim.

CONCLUSION

In order to comply with the maritime law calling for an apportionment of damages in direct ratio to respective fault, it is respectfully submitted that the judgment herein should be modified so that COURT CARPENTRY is held liable for 25% of the indemnity claim and I.T.O. is held liable for the balance. Alternatively, this matter should be remanded to the District Court for consideration and determination of COURT CARPENTRY's still open and unresolved claim for contribution from I.T.O.

Respectfully submitted,

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Certificate of Counsel

I, SIDNEY A. SCHWARTZ, appellate counsel for third party defendant-appellant, COURT CARPENTRY, do hereby certify that the foregoing Petition for Re-hearing and/or Re-hearing *in banc* is presented in good faith, is in my opinion well founded, and is not filed for the purpose of delay.

/s/ SIDNEY A. SCHWARTZ
Sidney A. Schwartz
Of Counsel to
ALEXANDER, ASH, SCHWARTZ & COHEN
Attorneys for Third Party Defendant-Appellant, Court Carpentry & Marine Contracting Company.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

PAUL KLEIN, being duly sworn, deposes and says:

That he is over eighteen years of age and is not a party to the within action. That on the day of August, 19 75, he served ~~two~~ true copies of the annexed PETITION FOR RE-HEARING AND/OR RE-HEARING IN BANC etc.

on

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herein, by depositing a true copy of the aforesaid properly enclosed in a securely sealed and postpaid wrapper in a Post Office box under the exclusive care and custody of the Government of the United States, at 801 Second Avenue, in the Borough of Manhattan, City and State of New York, addressed to the aforesaid as above stated, and that said address(es) was (were) the address(es) designated by the said attorney(s) as the address(es) within the State of New York, where papers in this action might be served.

Paul Klein

Sworn to before me this
15th day of August, 19 75.

Sharon S. Solash
Notary Public

SHARON S. SOLASH
NOTARY PUBLIC, STATE OF NEW YORK
No. 41-4526390
Qualified in Queens County
Commission Expires March 30, 1976